EXHIBIT 1

RENDERED: JUNE 15, 2017
TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2015-SC-000178-DG DATE 7/6/17 Kim Redmon, DC

KENTUCKY CATV ASSOCIATION, INC. (D/B/A KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION, INC.) — APPELLANT

ON APPEAL FROM COURT OF APPEALS
V. CASE NO. 2013-CA-001112-MR
FRANKLIN CIRCUIT COURT NO. 11-CI-01418

CITY OF FLORENCE, KENTUCKY; CITY OF WINCHESTER, KENTUCKY; CITY OF GREENSBURG, KENTUCKY; CITY OF MAYFIELD, KENTUCKY; KENTUCKY LEAGUE OF CITIES, INC.; LORI HUDSON FLANERY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET; AND THOMAS B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE — APPELLEES

AND 2015-SC-000181-DG

LORI HUDSON FLANERY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY; AND THOMAS B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY — APPELLANTS

Revised Statute (KRS) 136.600 *et seq.* While the Telecom Tax as a whole changes the way the Commonwealth taxes video telecommunications and programming providers, the subject of this litigation is one provision prohibiting "every political subdivision of the state" from collecting franchise fees or taxes on franchises subject to the Telecom Tax. KRS 136.660(1)(a)-(c) (Prohibition Provision). The Telecom Tax authority encompasses each of the Commonwealth's political subdivisions; however, we note that only the Cities are parties to this litigation.

The Telecom Tax assesses a tax on the gross revenues received by all multichannel video programming (MVP) and communications service providers, and is composed of excise taxes, sales taxes, and other similar taxes on the property of MVP service providers. MVP service is programming provided by a television broadcast station or similar entity and includes cable television services, satellite broadcast and wireless cable services, and internet protocol television.

The Telecom Tax imposes a 3% excise tax on all retail purchase of MVP services, as well as a 2.4% tax on the gross revenues received by all providers of MVP services, and a 1.3% tax on the gross revenues received by providers of communications services. KRS 136.604 and KRS 136.616. These provisions effectively impose a 5.4% tax on total charges for MVP services and a 4.3% tax on total charges for telecommunications services. Revenue collected under the Telecom Tax is then deposited into the General Fund.

for judgment on the pleadings. The circuit court granted the Cabinet's and KYCATV's motions and dismissed the petition, holding that the Telecom Tax does not violate Sections 163 and 164.[1] The Court of Appeals then vacated the circuit court's judgment and remanded, finding that the Telecom Tax's Prohibition Provision violates Sections 163 and 164, entitling the Cities to summary judgment.[2] We set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

This case concerns a matter of constitutional construction or interpretation, which we review *de novo*. *Greene v. Commonwealth*, 349 S.W.3d 892, 898 (Ky. 2011). In conducting that review, we must construe the constitutional provisions at issue in a manner that carries out the intent of the framers because "[t]he polestar in the construction of Constitutions is the intention of the makers and adopters." *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957). We gather that intent "both from the letter and the spirit of the document." *Id.* The dissent states that the majority, by looking to the framers' intent, "dangerously teeter[s] on injecting our own policy preferences into the case before us—a task most aptly reserved for the legislative branch."

---

[1] The parties filed motions for judgment on the pleadings; however, they attached exhibits to their pleadings. Because the exhibits constituted matters outside the pleadings, and the court considered those exhibits in rendering its judgment, we treat the court's order as a summary judgment rather than a judgment on the pleadings. Kentucky Rule of Civil Procedure (CR) 12.03.

[2] The Court of Appeals's analysis was limited to the constitutionality of the Prohibition Provision; however, it held that "the Telecommunications Tax violates Kentucky Constitution Sections 163 and 164 by prohibiting appellants from assessing and collecting franchise fees." To the extent that the COA held that the Prohibition Provision was unconstitutionally void, we affirm. However, we do not hold that the Telecom Tax in its entirety is unconstitutionally void.

> streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

Section 164 of the Kentucky Constitution provides:

> No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

The Appellants argue that neither section discusses a municipality's right to collect franchise fees and, as such, the Court of Appeals erred in implying that such a right exists. Rather, the Appellants contend that Section 163 only vests in municipalities the ability to control the original occupation of its public streets and rights-of-way and, similarly, Section 164 only vests in municipalities the ability to *grant* franchises to the highest and best bidder. The Court, having reviewed the Proceedings and Debates in the Constitutional Convention of 1890 (Debates), finds it abundantly clear that the framers of our Constitution intended that municipalities shall have both the power to grant franchises as well as the power to collect fees in exchange for granting those franchises.

Evident within the Debates concerning Sections 163 and 164[4] is the framers' desire to protect the citizens of a municipality from a city council

[4] During the Debates, within the Municipalities Committee, Sections 163 and 164 were titled "Section 14" and "Section 15," respectively.

asserting that the cities should have full control of the placement of telephone, electric light, and gas companies: "I cannot see how any gentleman on the floor could insist with sincerity and earnestness, that the city should not have control of its streets and alleys, which streets and alleys are constructed by taxation for the benefit of the city, and under its exclusive control." *Id.* at 2849. As Mr. Bronston stated, the guiding themes behind the enactment of Sections 163 and 164 were: 1) municipal control; and 2) municipal benefit via the sale of franchises. *Id.* Our predecessor Court echoed this notion in *Kentucky Utilities Company v. Board of Commissioners of City of Paris*:

> [T]he main purpose behind this section 164 was to insure that every so often the municipality should have the opportunity of revising the terms of the franchise which it had granted as to *rates*, quality, service, and the like, and to have the advantage of *obtaining from time to time for the franchise its value* which most likely would be enhanced by the growth of population and business.

254 Ky. 527, 71 S.W. 1024, 1028 (1933) (emphasis added).

A reading of the Debates makes clear that the municipality's twenty-year limitation in creating franchises emerged from the framers' dual concerns of control and public benefit. Ky. Const. § 164. Mr. Mackoy, Constitutional Convention Delegate from Covington, stated: "This method [of providing a set-year limitation] determines the actual value of the franchise, which ought to go to the public, to whom alone it is due, and still leaves profit on capital actually invested to the [franchise]." Debates, 2950.

Continuing in this vein, Mr. Young adamantly stated that the municipalities should receive the full return of their franchises: "The object of

While "the franchise inheres in the sovereignty of the state," it is only subject to the control of the General Assembly "save to the extent it has been delegated by the Constitution . . . ." *Kentucky Utils. Co.*, 71 S.W. at 1029. It is clear that the framers of our Constitution intended to delegate to municipalities: control over the placement of utilities within their public spaces and rights-of-way; and the right to reap the long-term profits of that control through consideration paid by private franchisees to the municipality, *i.e.*, franchise fees. The portion of the Telecom Tax prohibiting municipalities from levying franchise fees on MVP services, including fees intended as compensation for the use of the municipalities' rights-of-way, is contrary to Sections 163 and 164 of the Kentucky Constitution and is, thus, void as unconstitutional.

B. Kentucky Constitution Section 181.

KYCATV argues that the historical power of the municipalities to collect franchise fees was a delegation of the General Assembly's authority granted in Section 181 of the Kentucky Constitution. Section 181 provides:

> The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions. And the General Assembly may, by general laws only, authorize cities or towns of any class to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses or franchises, in lieu of

burdensome to franchise operators. As a result, the framers initially included the language "and no double tax shall be imposed" within what would become Section 181. *Id.*

Opponents of the "no double tax" provision were specifically concerned that prohibiting such a double tax would leave the General Assembly unable to collect taxes on the subject matter found in Section 181, including franchises, due to the General Assembly also collecting *ad valorem* tax on all property within the Commonwealth. *Id.* Mr. Mackoy, Constitutional Convention Delegate from Covington, first voiced this concern: "In a case from Paducah to the Court of Appeals, it was held that no *ad valorem* tax could be imposed on the same property. That that would be double taxation; and it seems to me, while we have always authorized municipalities to collect these license fees, that care should be taken not to make the tax a double one . . . ." *Id.* Mr. Bronston, Constitutional Convention Delegate from Henderson, then replied, "This might, in one sense, result in double taxation; but it is in conformity with the system which Kentucky has had for one hundred years. There are a good many classes of property subjected to double taxation, because they are taxed *ad valorem*, and then by license." *Id.*

One framer was able to summarize the Committee's position before the "no double taxation" issue was ultimately resolved. Mr. Nunn, Constitutional Convention Delegate from Crittenden, stated:

> If the Convention will turn to [Section 174], you will see that all property in this State shall be assessed according to its value [i.e., *ad valorem* tax]. That is one assessment. The first part of this [Section 181] authorizes the Legislature to allow the State to put a tax upon the

The General Assembly cannot withdraw that which it did not and cannot delegate. Accordingly, we hold that the General Assembly did not have the power under Section 181 of the Kentucky Constitution to prohibit municipalities from collecting franchise fees in exchange for use of their rights-of-way, as that power was constitutionally granted in Sections 163 and 164.

C. Severance of the Telecom Tax's Prohibition Provision.

In 1996, the federal government enacted legislation that prohibited local governments from collecting taxes on satellite providers of MVP. As a result, satellite providers of such programming were exempt from local franchise fees, while non-satellite providers of such programming remained liable for those fees. To alleviate this perceived inequity, the General Assembly enacted the Telecom Tax, imposing an "excise tax . . . on the retail purchase of [MVP] service provided to a person whose place of primary use is in this state." KRS 136.604. Furthermore, the General Assembly required the programming providers to collect the tax from the purchasers and to remit the proceeds, less compensation for collecting the tax, to the Commonwealth. KRS 136.606, 136.614, 136.620.

As we held above, the General Assembly cannot prohibit the Cities from collecting franchise fees from franchisees as consideration for the use of the Cities' rights-of-way. The Cities argue that the Prohibition Provision is the only portion of the Telecom Tax that is unconstitutional and that this portion may be severed from the remainder of the Telecom Tax. We agree. "Whenever a statute contains unobjectionable provisions separable from those found to be

alleviating the perceived inequity among various types of program providers that was created by the federal legislation.[6]

In conclusion, we note that political subdivisions that are not within the purview of Sections 163 and 164 of the Kentucky Constitution remain bound by KRS 136.600, *et seq.* Furthermore, nothing in this opinion prevents municipalities from opting to forgo collecting a franchise fee in lieu of participating in the Telecom Tax scheme. Nor does anything in this opinion prevent the Commonwealth from collecting the taxes due under the remaining portions of the Telecom Tax. However, the Telecom Tax's Prohibition Provision, KRS 136.660(1)(a)-(c), is unconstitutionally void as applied to the Cities.

CONCLUSION.

For the reasons stated above, we affirm the opinion of the Court of Appeals, vacate the Franklin Circuit Court's order, and remand this case to the Franklin Circuit Court to enter summary judgment in favor of the Cities consistent with this Opinion.

All sitting. Cunningham, Keller, VanMeter, Venters and Wright, JJ., concur. Minton, C.J. dissents by separate opinion in which Hughes, J. joins.

MINTON, C.J., DISSENTING: I respectfully dissent from today's decision striking down portions of the Telecom Tax because I believe the majority

---

[6] We note that the agreement between the city of Florence and TKR states: "So that no provider of multi-channel services . . . shall receive an unfair competitive advantage, Operator shall be entitled to relief from competition as follows. If a competing multi-channel service [ ] is available to 50% or greater of the City then: . . . 9. Operator shall have no greater responsibility to pay a franchise fee than Competitor." Thus, Appellants' concern that different MVP providers would pay unequal amounts appears unwarranted, at least as to the city of Florence.

for the legislative branch. Only the text of the 1891 Constitution was ratified. And our textual tools of constitutional construction are perfectly capable of resolving this case without invalidating an otherwise properly enacted piece of legislation.

The issue in this case is, of course, whether Sections 163 and 164 of the Kentucky Constitution cede to municipalities the inalienable power to assess franchise fees or whether that power remains dormant with the General Assembly to use or delegate as it deems appropriate. I agree wholeheartedly with the majority's analysis of Section 163 that any company operating what is now considered a public utility may conduct its business—and occupy public rights-of-way in perpetuity—only with consent of local legislative bodies. I further agree with the notion that this provision represents a clear statement that under our current constitutional structure, the ability to grant franchises to public utility companies is solely a local prerogative; it is a power given to local governments that may not be usurped by the General Assembly. That is also the only local function clearly and plainly extended by the terms of the text. But the power to assess franchise fees, if there is one, must therefore necessarily be an implied power derivative of the locality's power to grant the franchise itself.

To me, construing Sections 163 and 164 to include this implied power defies our established norm of constitutional construction. As a general rule, "a city possesses only those powers *expressly granted* by the Constitution and statutes plus such powers as are *necessarily* implied or incident to the

franchises, the General Assembly may dictate *how* they exercise that power. 71 S.W.2d 1024 (Ky. 1933). This case upheld a 1926 law enacted by the General Assembly requiring municipalities to provide for a sale of a new franchise at least 18 months prior to the expiration of the current franchise and required the franchise to be awarded to the "highest and best bidder." *Id.* at 1026. Our predecessor court recognized that the power to grant a franchise is an act of sovereignty, traditionally reserved to the legislative body, but limited in this instance by the state constitution, which limits this legislative function by reserving the decision to grant franchises to local municipalities. *Id.* at 1026-27. *See also* McQuillin's Municipal Corporations § 1748 (2nd ed.).

The court then appropriately recognized the crucial question: how far have "the people by their Constitution...stripped from their legislature such power and given it to local bodies, here municipalities?" *Id.* at 1027. A fair reading of this case supports the proposition that Sections 163 and 164 only grant exclusive powers to determining who physically occupies its right-of-way. By upholding the 1926 statute, we unavoidably ruled that the General Assembly may still intervene in matters of franchise and may dictate *how* municipalities exercise this discretion by exercising a "dormant power" it always retained. Though the Telecom Tax certainly presents a different context, the legislature is still injecting itself into the franchise process and in a way not inconsistent with the stated terms of the constitutional text.

To resolve this case, all we must do is to simply apply a discerning eye to the words enshrined as Kentucky constitutional law. And those words

COUNSEL FOR KENTUCKY CATV ASSOCIATION, INC.:

Douglas Frank Brent
Timothy Joseph Eifler
Jackson W. White
Stoll Keenon Ogden PLLC

Eric S. Tresh
Maria M. Todorova
Sutherland Asbill & Brennan, LLP

COUNSEL FOR LORI HUDSON FLANERY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY; THOMAS B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY:

Bethany Atkins Rice
Office of Legal Services for Revenue

COUNSEL FOR CITY OF FLORENCE, KENTUCKY; CITY OF WINCHESTER, KENTUCKY; CITY OF GREENSBURG, KENTUCKY; CITY OF MAYFIELD, KENTUCKY; AND KENTUCKY LEAGUE OF CITIES, INC.:

Barbara B. Edelman
David James Treacy
Haley Trogdlen McCauley
Dinsmore & Shohl LLP

COUNSEL FOR AMICUS CURIAE, CHARTER COMMUNICATIONS, INC.:

John Nalbandian
Taft Stettinius & Hollister, LLP

Gardner F. Gillespie
J. Aaron George
Sheppard Mullin Richter & Hampton LLP